

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROBERT BRAY,

Petitioner,

v.

JACK PALMER, *et al.*,

Respondents.

Case No. 3:11-cv-00448-MMD-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. This matter comes before the Court on the merits of the remaining grounds of the petition.

I. PROCEDURAL HISTORY

Petitioner was arrested in Reno, Nevada, in August of 1997 and charged with three counts of armed robbery and three counts of ex-felon in possession of a firearm. (Exh. 59, at p. 1.¹) Petitioner invoked his right to a trial within sixty (60) days of arraignment, pursuant to Nevada Revised Statute § 178.556(2). Subsequently, newly appointed counsel, Robert Bell, requested a continuance and petitioner waived his right to a trial within sixty (60) days of his arraignment. (Exh. 14.) The state district court set trial for January 26, 1998. (*Id.*)

¹The exhibits referenced in this order are found in the Court's record at dkt. nos. 13-17.

1 On October 15, 1997, petitioner escaped from the Washoe County Jail. (Exh.
2 59.) As a result, the State of Nevada filed a criminal complaint charging petitioner with
3 escape and the Reno Justice Court issued an arrest warrant. (*Id.*) A hold request was
4 issued on the escape charge on October 15, 1997. (*Id.*)

5 On October 22, 1997, petitioner was arrested in San Diego, California, for felony
6 offenses committed following petitioner's escape from the Washoe County Jail. (Exh.
7 59, at p. 2.) In July of 1998, a California state court sentenced petitioner to serve eleven
8 (11) years in prison in California. (*Id.*) When petitioner failed to appear in state district
9 court in Nevada for his January 1998 trial on the pending armed robbery and
10 possession of weapon charges, the state district court issued a bench warrant for
11 petitioner's arrest. (Exh. 20.) Thereafter, on March 3, 1999, petitioner was formally
12 notified under the Interstate Agreement on Detainers (IAD) that Nevada authorities
13 lodged a detainer against him regarding the robbery and ex-felon charges. (Exh. 59, at
14 p. 3.) Petitioner took no action to invoke his rights under the IAD after he received this
15 notice. (*Id.*, at p. 4.)

16 On September 17, 2007, while serving his California sentence, petitioner
17 received a notice pursuant to the IAD addressing all of the pending, untried robbery
18 charges, weapons possession charge, and escape charge. Petitioner formally
19 requested a final disposition of the listed charges. Although petitioner had received prior
20 IAD notices related to these charges and interacted with California officials regarding
21 those notices, the 2007 request was the first time petitioner notified the Washoe County
22 District Attorney's Office and the state district court of his desire to bring the pending,
23 untried charges to final disposition. (Exh. 59, at pp. 3-5.)

24 Petitioner returned to Washoe County in autumn of 2007, and the state district
25 court appointed an attorney from the Washoe County Alternate Public Defender's office,
26 Carter Conway, to represent petitioner. Conway testified at the evidentiary hearing on
27 petitioner's state habeas petition that he investigated petitioner's case with respect to
28 the possibility of filing a motion to dismiss based on violations of the IAD. He testified

1 that he advised petitioner of his conclusion that such a motion was not likely to succeed.
2 Both Conway and the petitioner testified that with petitioner's consent, counsel began
3 negotiating with the State to reach a final resolution to the charges. (Exh. 59, at pp. 5-7.

4 Pursuant to negotiations with the State, on April 3, 2008, petitioner entered a
5 guilty plea to a single count of armed robbery. (Exh. 23, 24, 25 and 59, at pp. 7-8.) On
6 May 12, 2008, the state district court entered judgment and sentenced petitioner to two
7 consecutive terms of 36 to 120 months for the armed robbery and deadly weapon
8 enhancement. (Exh. 27.) Petitioner did not pursue a direct appeal.

9 On April 1, 2009, petitioner filed a state post-conviction habeas petition. (Exh.
10 30.) He asserted the following claims: (1) ineffective assistance of counsel; (2) violation
11 of his rights to a speedy trial and due process; and (3) violation of his Fifth, Sixth and
12 Fourteenth Amendment rights based on the State's failure to comply with the IAD. (*Id.*)
13 The state district court appointed counsel to represent petitioner during his post-
14 conviction proceedings, and counsel filed a supplemental petition. (Exh. 32 & 39.) The
15 supplemental petition asserted violations of the IAD had violated his constitutional rights
16 to a speedy trial and due process and that he was denied his constitutional right to
17 effective assistance of counsel. (Exh. 39.)

18 The state district court held an evidentiary hearing on petitioner's post-conviction
19 habeas petition. (Exh. 48.) On July 30, 2010, the state district court filed findings of fact,
20 conclusions of law, and an order denying petitioner's post-conviction habeas petition.
21 (Exh. 59.) Petitioner appealed the denial of his petition. (Exh. 62.) In an order filed June
22 8, 2011, the Nevada Supreme Court affirmed the denial of the post-conviction habeas
23 petition. (Exh. 83.) The Nevada Supreme Court determined that petitioner's IAD claims
24 were procedurally defaulted and that the denial of relief for his ineffective assistance of
25 counsel claims was supported by substantial evidence. (*Id.*)

26 Petitioner dispatched this federal habeas petition to this Court on June 20, 2011,
27 which contains three grounds for relief. (Dkt. no. 7.) Respondents moved to dismiss the
28 petition. (Dkt. no. 12.) By order filed March 29, 2012, this Court granted the motion to

1 dismiss in part, finding that Ground 1(a) of the petition is unexhausted, and that
2 Grounds 2 and 3 of the petition are procedurally barred. (Dkt. no. 31.) The Court gave
3 petitioner three options for proceeding with respect to his exhausted claim: (1)
4 abandoning his unexhausted claim; (2) dismissing the entire petition without prejudice;
5 or (3) seeking a stay to return to state court to exhaust the claim. (Dkt. no. 31, at pp. 8-
6 9.) In response, petitioner filed a motion for reconsideration. (Dkt. no. 33.) On June 5,
7 2012, the Court denied petitioner's motion for reconsideration and reiterated petitioner's
8 three options for dealing with this unexhausted claim. (Dkt. no. 35.) Petitioner elected to
9 abandon unexhausted Ground 1(a). (Dkt. no. 36.) Respondents have filed an answer to
10 the remaining portions of the petition, Grounds 1(b) and 1(c). (Dkt. no. 40.) Petitioner
11 filed a reply to the answer on August 21, 2012. (Dkt. no. 42.)

12 II. FEDERAL HABEAS CORPUS STANDARDS

13 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. §
14 2254(d), provides the legal standard for the Court's consideration of this habeas
15 petition:

16 An application for a writ of habeas corpus on behalf of a person in custody
17 pursuant to the judgment of a State court shall not be granted with respect
18 to any claim that was adjudicated on the merits in State court proceedings
unless the adjudication of the claim –

19 (1) resulted in a decision that was contrary to, or involved an
20 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable
22 determination of the facts in light of the evidence presented in the State
court proceeding.

23 The AEDPA "modified a federal habeas court's role in reviewing state prisoner
24 applications in order to prevent federal habeas 'retrials' and to ensure that state-court
25 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
26 685, 693-694 (2002). A state court decision is contrary to clearly established Supreme
27 Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a
28 rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the

1 state court confronts a set of facts that are materially indistinguishable from a decision
2 of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
3 Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v.*
4 *Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694
5 (2002)). The formidable standard set forth in section 2254(d) reflects the view that
6 habeas corpus is "a guard against extreme malfunctions in the state criminal justice
7 systems,' not a substitute for ordinary error correction through appeal." *Harrington v.*
8 *Richter*, 562 U.S. ___, ___, 131 S.Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443
9 U.S. 307, 332 n.5 (1979)).

10 A state court decision is an unreasonable application of clearly established
11 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court
12 identifies the correct governing legal principle from [the Supreme Court's] decisions but
13 unreasonably applies that principle to the facts of the prisoner's case." *Lockyer v.*
14 *Andrade*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable
15 application" clause requires the state court decision to be more than merely incorrect or
16 erroneous; the state court's application of clearly established federal law must be
17 objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining
18 whether a state court decision is contrary to, or an unreasonable application of federal
19 law, this Court looks to the state courts' last reasoned decision. See *Ylst v.*
20 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072,
21 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

22 In a federal habeas proceeding, "a determination of a factual issue made by a
23 state court shall be presumed to be correct," and the petitioner "shall have the burden of
24 rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §
25 2254(e)(1). If a claim has been adjudicated on the merits by a state court, a federal
26 habeas petitioner must overcome the burden set in § 2254(d) and (e) on the record that
27 was before the state court. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1400 (2011).

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1 **III. DISCUSSION**

2 In Ground 1 of the petition, petitioner alleges the following violations of his right to
3 the effective assistance of counsel: (a) counsel Robert Bell failed to investigate,
4 interview, or seek the deposition of alibi witnesses; (b) counsel Bell failed to activate or
5 otherwise facilitate the detainer notification that petitioner received in March 1999 in
6 order to resolve the untried armed robbery charges against him; and (c) subsequent
7 counsel Cotter Conway failed to file a pretrial motion to dismiss the escape and armed
8 robbery charges for failure to timely try petitioner pursuant to the IAD. (Dkt. no. 7, at p.
9 3.) Ground 1(a) is unexhausted and petitioner has abandoned that claim. Thus, the
10 remaining grounds for relief are Grounds 1(b) and 1(c), which both allege the ineffective
11 assistance of counsel.

12 **A. Ineffective Assistance of Counsel Standard**

13 Ineffective assistance of counsel claims are governed by the two-part test
14 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
15 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
16 burden of demonstrating that (1) counsel's performance was unreasonably deficient,
17 and (2) that the deficient performance prejudiced the defense. *Williams v. Taylor*, 529
18 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
19 ineffectiveness, the defendant must show that counsel's representation fell below an
20 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must
21 show that there is a reasonable probability that, but for counsel's unprofessional errors,
22 the result of the proceeding would have been different. *Id.* A reasonable probability is
23 "probability sufficient to undermine confidence in the outcome." *Id.* Additionally, any
24 review of the attorney's performance must be "highly deferential" and must adopt
25 counsel's perspective at the time of the challenged conduct, in order to avoid the
26 distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's burden to
27 overcome the presumption that counsel's actions might be considered sound trial
28 strategy. *Id.*

1 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
 2 performance of counsel resulting in prejudice, "with performance being measured
 3 against an 'objective standard of reasonableness,' . . . 'under prevailing professional
 4 norms.'" *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state
 5 court has already rejected an ineffective assistance claim, a federal habeas court may
 6 only grant relief if that decision was contrary to, or an unreasonable application of the
 7 *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is a strong
 8 presumption that counsel's conduct falls within the wide range of reasonable
 9 professional assistance. *Id.*

10 The United States Supreme Court has described federal review of a state
 11 supreme court's decision on a claim of ineffective assistance of counsel as "doubly
 12 deferential." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v.*
 13 *Mirzayance*, 556 U.S. 111, 112-113, 129 S.Ct. 1411, 1413 (2009)). In *Cullen v.*
 14 *Pinholster*, the Supreme Court emphasized that: "We take a 'highly deferential' look at
 15 counsel's performance through the 'deferential lens of § 2254(d).'" *Id.* at 1403
 16 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance
 17 of counsel claim is limited to the record before the state court that adjudicated the claim
 18 on the merits. *Id.* at 1398-1401. The United States Supreme Court has specifically
 19 reaffirmed the extensive deference owed to a state court's decision regarding claims of
 20 ineffective assistance of counsel:

21 Establishing that a state court's application of *Strickland* was
 22 unreasonable under § 2254(d) is all the more difficult. The standards
 23 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at
 24 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
 25 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
 26 is "doubly" so, *Knowles*, 556 U.S. at ___, 129 S.Ct. at 1420. The
 27 *Strickland* standard is a general one, so the range of reasonable
 28 applications is substantial. 556 U.S. at ___, 129 S.Ct. at 1420. Federal
 habeas courts must guard against the danger of equating
 unreasonableness under *Strickland* with unreasonableness under §
 2254(d). When § 2254(d) applies, the question is whether there is any
 reasonable argument that counsel satisfied *Strickland's* deferential
 standard.

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1 *Harrington v. Richter*, 131 S.Ct. at 788. "A court considering a claim of ineffective
2 assistance of counsel must apply a 'strong presumption' that counsel's representation
3 was within the 'wide range' of reasonable professional assistance." *Id.* at 787 (quoting
4 *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation
5 amounted to incompetence under prevailing professional norms, not whether it deviated
6 from best practices or most common custom." *Id.* (internal quotations and citations
7 omitted).

8 **B. Ground 1(b)**

9 Petitioner alleges that his attorney, Robert Bell, was ineffective because he failed
10 to activate or otherwise facilitate the detainer notification that petitioner received in
11 March 1999, in order to resolve the untried armed robbery charges. Bell was appointed
12 to represent petitioner in the underlying criminal matter in Nevada. (Exh. 14, at p. 1.)
13 The state district court found that petitioner failed to provide evidence to support his
14 ineffective assistance of counsel claim. (Exh. 59, at pp. 3-4.) Specifically, the state
15 district court ruled: "Insofar as Bray alleged that Bell was ineffective because he failed to
16 invoke Bray's rights under the IAD, or move to dismiss based on a violation of the IAD,
17 Bray failed to present any evidence proving or tending to prove that this omission was
18 objectively unreasonable or prejudicial under *Strickland*." (Exh. 59, at p. 4, n.3.) On
19 appeal, the Nevada Supreme Court affirmed the denial of relief, stating that "the record
20 reveals that the district court's factual findings are supported by substantial evidence
21 and are not clearly wrong [a]nd Bray has not demonstrated that the district court erred
22 as a matter of law." (Exh. 83, at p. 3.) The factual findings of the state court are
23 presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the
24 presumption that the state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082,
25 1087 (9th Cir. 2000). Petitioner has failed to demonstrate that Bell's performance was
26 deficient or that he was prejudiced under *Strickland*. Petitioner has failed to meet his
27 burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved
28 an unreasonable application of, clearly established federal law, as determined by the

1 United States Supreme Court, or that the ruling was based on an unreasonable
2 determination of the facts in light of the evidence presented in the state court
3 proceeding. Federal habeas relief is denied as to Ground 1(b) of the petition.

4 **C. Ground 1(c)**

5 Petitioner alleges that subsequent counsel, Cotter Conway, failed to file a pretrial
6 motion to dismiss the escape and armed robbery charges for failure to timely try
7 petitioner pursuant to the IAD.

8 In order to initiate the protections of the Interstate Agreement on Detainers, the
9 inmate must provide notice of his desire for a formal resolution of the outstanding
10 charges to the prosecuting agency and the appropriate court in the sending state. *Fex v.*
11 *Michigan*, 507 U.S. 43 (1993); *U.S. v. Johnson*, 196 F.3d 1000, 1002 (9th Cir. 1999)
12 (Under *Fex*, it does not matter what the petitioner may or may not have done in an
13 attempt to cause delivery or how much or little delay there is in delivery); *see also U.S.*
14 *v. Espinoza*, 866 F.2d 1067, 1070 (9th Cir. 1988) (finding counsel was not ineffective for
15 failing to raise IAD as a defense where inmate did not satisfy the requirements for
16 initiating the IAD). In *Fex*, the United States Supreme Court recognized that the
17 protections provided for in the IAD are not triggered until the actual delivery of the
18 request for formal resolution of the outstanding charges to the prosecuting agency and
19 the appropriate court. 507 U.S. at 47 ("Respondent argues that no one can have
20 'caused something to be delivered' unless delivery in fact occurs. That is self-evidently
21 true, and so we must reject petitioner's contention that prisoner's transmittal of an IAD
22 request to the prison authorities commences the 180-day period even if the request gets
23 lost in the mail and is never delivered to the receiving State . . .").

24 In the instant case, the state district court found that petitioner's claim that
25 Conway was ineffective for not pursuing a motion to dismiss under a theory based upon
26 a violation of the IAD lacked merit. (Exh. 59, at p. 8.) The state district court's order
27 denying relief made express factual findings regarding the sequence of events that
28 occurred between petitioner's escape from the Washoe County Jail and his return to

1 Nevada after an extended period of incarceration in California on separate unrelated
2 charges. (Exh. 59, at pp. 2-5.) The court found that: (1) petitioner "took no action" when
3 he initially received the notice of detainer on the armed robbery and ex-felon in
4 possession of a firearm charges in March 1999, and "[h]is testimony to the contrary is
5 not credible"; (2) petitioner refused to sign the form requesting a formal disposition of his
6 escape charge when he was notified of the detainer lodged on the escape charge in
7 August 2004; (3) the letters drafted by attorney Bell did not invoke petitioner's rights
8 under the IAD; and (4) the first time that petitioner provided notice of his desire for a
9 formal resolution of the pending Nevada charges to the Washoe County District
10 Attorney's Office and the state district court, thereby invoking the protections of the IAD,
11 was September 17, 2007. (Exh. 59, at pp. 4-6.)

12 The state district court also made express factual findings regarding the efforts
13 made by Conway in investigating whether a violation of the IAD occurred. (Exh. 59, at
14 pp. 5-6.) In particular, the court's findings reference Conway's efforts to obtain and
15 review documentation from the California prisons and research the law pertaining to the
16 IAD. (*Id.*) The court found that Conway's decision not to file a motion to dismiss based
17 on an IAD violation was based on his conclusion "that a motion to dismiss under the IAD
18 would not be successful." (*Id.*, at p. 6.)

19 As a result of these factual findings, the state district court concluded that
20 counsel's "failure to file the motion to dismiss, predicated on an IAD violation, was not
21 shown to be objectively unreasonable under prevailing professional norms. (Exh. 59, at
22 p. 6.) The state district court further found that petitioner suffered no prejudice as a
23 result of Conway's decision not to file the motion to dismiss because "there was no
24 reasonable probability that the motion to dismiss would have been granted." (*Id.*) On
25 appeal, the Nevada Supreme Court concluded: "Our review of the record reveals that
26 the district court's factual findings are supported by the substantial evidence and are not
27 clearly wrong. And Bray has not demonstrated that the district court erred as a matter of
28 law." (Exh. 83, at p. 3.) The factual findings of the state court are presumed correct. 28

1 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the
2 state court's findings are correct. *Bragg*, 242 F.3d at 1087. There is no evidence that
3 prior to 2007, the Washoe County District Attorney's Office and the state district court
4 received a formal request for resolution of the charges from petitioner that would have
5 triggered the protections of the IAD under *Fex v. Michigan*, 507 U.S. at 47. Thus,
6 petitioner has not shown that a motion to dismiss based on an IAD violation would have
7 been successful. Petitioner has failed to demonstrate that Conway's performance was
8 deficient or that he was prejudiced under *Strickland*. Petitioner has failed to meet his
9 burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved
10 an unreasonable application of, clearly established federal law, as determined by the
11 United States Supreme Court, or that the ruling was based on an unreasonable
12 determination of the facts in light of the evidence presented in the state court
13 proceeding. Federal habeas relief is denied as to Ground 1(c) of the petition.

14 **IV. CERTIFICATE OF APPEALABILITY**

15 District courts are required to rule on the certificate of appealability in the order
16 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
17 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In
18 order to proceed with his appeal, petitioner must receive a certificate of appealability. 28
19 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946,
20 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
21 2001). Generally, a petitioner must make "a substantial showing of the denial of a
22 constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2);
23 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that
24 reasonable jurists would find the district court's assessment of the constitutional claims
25 debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
26 inquiry, the petitioner has the burden of demonstrating that the issues are debatable
27 among jurists of reason; that a court could resolve the issues differently; or that the
28 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,

1 no reasonable jurist would find this Court's denial of the petition debatable or wrong.
2 The Court therefore denies petitioner a certificate of appealability.


3 **V. CONCLUSION**

4 It is therefore ordered that petition for a writ of habeas corpus is denied in its
5 entirety.

6 It is further ordered that petitioner is denied a certificate of appealability.

7 It is further ordered that the Clerk of Court shall enter judgment accordingly.

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9 DATED THIS 14th day of July 2014.

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12 MIRANDA M. DU
13 UNITED STATES DISTRICT JUDGE
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